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No.

In the Supreme Court of the United States

BALMORIS ALEXANDER CONTRERAS-MARTINEZ,
PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(42)(A), an alien qualifies as a "refugee," and therefore is eligible for asylum, if, *inter alia*, the alien is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of * * * membership in a particular social group." The question presented is as follows:

Whether a group must be "socially visible" and "particularized," as the Board of Immigration Appeals requires, in order to qualify as a "particular social group" for purposes of the INA.

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PETITION FOR A WRIT OF CERTIORARI

Balmoris Alexander Contreras-Martinez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is unreported. The decisions of the Board of Immigration Appeals (App., *infra*, 6a-8a) and the immigration judge (App., *infra*, 9a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

In relevant part, the Immigration and Nationality Act, 8 U.S.C. 1101(a)(42), provides:

> The term "refugee" means (A) any person who is outside any country of such person's nationality * * * and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]

STATEMENT

After fleeing from El Salvador to the United States, petitioner applied for asylum, contending that he possessed a well-founded fear of persecution if he returned to El Salvador on account of his refusal to join a gang. An immigration judge denied petitioner's application, App., *infra*, 9a-27a, and the Board of Immigration Appeals dismissed petitioner's appeal, *id.* at 6a-8a. The court of appeals denied petitioner's petition for review. *Id.* at 1a-5a.

1. a. In 1980, Congress passed the Refugee Act, the Nation's first comprehensive legislation relating to asylum. See Pub. L. No. 96-212, 94 Stat. 102. The purpose of the Refugee Act was to "give the [government] sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the

world." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (citation omitted).

The provisions of the Refugee Act are codified as part of the Immigration and Nationality Act (INA). As amended, the INA provides that the Attorney General and the Secretary of Homeland Security may, in their discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). Where the alien is in removal proceedings, the alien applies for asylum to the immigration judge with jurisdiction over the proceedings, and the Board of Immigration Appeals (BIA) hears any ensuing appeal. See 8 C.F.R. 1240.1 (a)(1), 1240.15. The Attorney General has the ultimate authority to review any decision of the BIA. See 8 C.F.R. 1003.1(h).

The INA defines a "refugee" to include an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).[1] That definition is drawn from the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577—which, in turn, incorporated a definition contained in the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

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[1] Similarly, where the alien is in removal proceedings, he may be entitled to *mandatory* withholding of removal if "the alien's life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A).

Of the five bases for persecution set out in Section 1101(a)(42)(A), "membership in a particular social group" has proven to be the most difficult to interpret and apply. See, *e.g.*, *Fatin* v. *INS*, 12 F.3d 1233, 1238 (3d Cir. 1993) (Alito, J.) (noting that "[b]oth courts and commentators have struggled to define 'particular social group'"). The statute contains no definition of the phrase, and neither the legislative history of the statute nor the history of the international agreements on which it was based sheds any helpful light on the phrase's meaning. See *id.* at 1239. This case concerns the question whether a group must be "socially visible" and "particularized" in order to qualify as a "particular social group" for purposes of the INA.

b. The BIA has issued a series of decisions concerning the definition of "particular social group." In the leading decision, the BIA interpreted "particular social group" to mean "a group of persons all of whom share a common, immutable characteristic." *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). In adopting that interpretation, the BIA reasoned that the definition of "refugee" also refers to race, religion, nationality, and political opinion, and that "[e]ach of these grounds describes persecution aimed at an immutable characteristic." *Ibid.* The BIA explained that, in order to be "immutable," the characteristic "must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Ibid.* For two decades after its decision in *Acosta*, the BIA focused on the existence of an "immutable characteristic" in determining whether an alien was a member of a "particular social group." See, *e.g.*, *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997); *In re H-*, 21

I. & N. Dec. 337, 343 (B.I.A. 1996); *In re Kasinga*, 21 I. & N. Dec. 357, 365-366 (B.I.A. 1996).

More recently, however, the BIA has engrafted two additional requirements onto its definition of "particular social group": *viz.*, whether the group "possess[es] a recognized level of social visibility" and "ha[s] particular and well-defined boundaries." *In re S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008).[2] Although the BIA initially suggested that "social visibility" and "particularity" were merely factors in a holistic analysis, see, *e.g.*, *In re C-A-*, 23 I. & N. Dec. 951, 957 (B.I.A.), review denied *sub nom. Castillo-Arias* v. *U.S. Attorney General*, 446 F.3d 1190 (11th Cir. 2006), cert. denied, 549 U.S. 1115 (2007), it has since made clear that those considerations are "require-[ments]" for "membership in a purported social group." *S-E-G-*, 24 I. & N. Dec. at 582. In fact, in the BIA's most recent decisions, the social-visibility and particularity requirements have effectively supplanted the immutability requirement as the primary focus of the inquiry. See, *e.g.*, *In re E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008) (concluding that the proposed social group "lack[ed] the social visibility that would allow others to identify its members as part of such a group").

2. a. It is no overstatement to say that El Salvador "is captive to the growing influence and violence of gangs." U.S. Agency for International Development, Bureau for Latin Am. & Caribbean Affairs, *Central*

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[2] The BIA recently reopened proceedings in *S-E-G-* for the limited purpose of affording some of the asylum applicants a new hearing based on their status as unaccompanied minors. See Gov't Br. 20 n.8, *Ramos* v. *Holder*, No. 09-1932 (7th Cir. Aug. 10, 2009); Opp. to Pet. for Reh'g En Banc at 14-15, *Orellana-Monson* v. *Holder*, No. 08-60394 (5th Cir. Aug. 18, 2009). The reopening does not appear to affect the precedential status of the BIA's decision.

America and Mexico Gang Assessment 34, 44 (2006). Perhaps the most notorious of those gangs is Mara Salvatrucha (MS-13), a "sophisticated organization[]" with a "complex, clandestine hierarch[y]." Harvard Law School Human Rights Program, *No Place to Hide: Gang, State, and Clandestine Violence in El Salvador* 25, 28 (2007). The Salvadoran police has been unable to control the activities of gangs such as MS-13, and, as a result, youths who live in areas dominated by gangs "simply have no choice" as to whether to join. *Id.* at 30; see *id.* at 61-62. Gangs such as MS-13 have targeted youths who refuse to join, along with their families, for physical abuse and even death. See *id.* at 30; C.A. App. 235.

b. Petitioner is a Salvadoran national. He grew up in El Salvador; when he was four years old, his mother fled to the United States and obtained asylum, and he was raised by a series of other family members. As a teenager, petitioner refused to join MS-13, even though most of the students at his school were members. He grew up as an Adventist, and he later testified that the violent activities of MS-13 were "against all the values [he] had learned" in his faith. Because of his refusal to join MS-13, petitioner was constantly harassed by gang members, who would push, slap, and taunt him. A female classmate was gang-raped and killed, apparently for refusing to join the gang. App., *infra*, 10a, 11a-12a; C.A. App. 89-96.

In 2004, a group of approximately fifteen to twenty gang members attacked petitioner as he was walking home from school, beating him and hitting him with rocks. During the attack, petitioner was offered one last chance to join the gang; once again, he refused. A gang member then pointed a pistol at petitioner's head and said, "Today you die." Petitioner heard a voice say someone was coming; he then passed out. His cousin lat-

er told him that, when the police had found him lying injured, they laughed and said there was nothing they could do. The police never filed an official report of the incident, and, to the best of petitioner's knowledge, the perpetrators were never caught. App., *infra*, 22a; C.A. App. 97-98.

Petitioner suffered multiple injuries and required hospitalization for several days. Shortly after returning home, he received a note from MS-13 threatening to kill him if he revealed who had attacked him. Approximately two days after receiving the note, petitioner withdrew his life savings and fled to the United States. After a lengthy and difficult journey through Guatemala and Mexico, he was apprehended by American immigration officials near Brownsville, Texas; he was allowed into the country and currently lives with his brother in Gaithersburg, Maryland. App., *infra*, 10a; C.A. App. 89, 98-99.

3. U.S. Immigration and Customs Enforcement initiated removal proceedings against petitioner. Petitioner conceded that he was removable but, as is relevant here, timely applied for asylum, contending that he was unable or unwilling to return to El Salvador because he possessed a well-founded fear of persecution on account of his refusal to join MS-13.[3] After a hearing, an immigration judge denied petitioner's application. App., *infra*, 9a-27a.

As a preliminary matter, the immigration judge determined that petitioner was credible, reasoning that his

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[3] Petitioner also sought both withholding of removal under the INA and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. Those claims were rejected below, see App., *infra*, 5a, 8a, 25a-26a, and neither of those claims is at issue in this petition.

testimony was "candid, detailed, and for the most part, consistent." App., *infra*, 21a. The judge also determined that petitioner "has been the victim of persecution in the past," based, *inter alia*, on the 2004 assault. *Id.* at 22a. The immigration judge, however, ultimately concluded that petitioner could not show that his persecution was inflicted on account of membership in a particular social group. *Id.* at 24a. The judge reasoned that "th[e] claimed social group"—*viz.*, of Salvadoran youths who refuse to join gangs because of their opposition to the gangs' violent activities—was "too tenuous to qualify" as a "particular social group" under Section 1101(a)(42)(A). *Ibid.* The judge also suggested that petitioner had failed to show that he was persecuted "on account of" his membership in that group: *i.e.*, that there was a nexus between the persecution and group membership. *Ibid.*

4. The Board of Immigration Appeals dismissed petitioner's appeal. App., *infra*, 6a-8a. The BIA determined that petitioner's proposed social group was "too broad and ill defined to constitute a discrete particular social group within the meaning of the [INA]." *Id.* at 7a. In so doing, the BIA cited its decision in *S-E-G-* for the specific proposition that Salvadoran youths who refuse to join gangs because of their opposition to the gangs' violent activities do not "constitute a 'particular social group.'" *Ibid.*; see *id.* at 8a (citing *E-A-G-* for the proposition that "'persons resistant to gang membership' does not constitute a particular social group").

5. The court of appeals denied petitioner's petition for review. App., *infra*, 1a-5a.

As is relevant here, the court of appeals explained that "the [BIA] has defined 'persecution on account of membership in a particular social group' within the meaning of the INA to mean persecution that is directed toward an individual who is a member of a group of per-

sons all of whom share a common, immutable characteristic." App., *infra*, 4a (internal quotation marks omitted) (quoting *Acosta*, 19 I. & N. Dec. at 233). The court of appeals added, however, that, "in addition to 'immutability,' the [BIA] requires that a particular social group have: '(1) social visibility, * * * (2) be defined with sufficient particularity, . . . and (3) not be defined exclusively by the fact that its members have been targeted for persecution.'" *Ibid.* (quoting *Scatambuli* v. *Holder*, 558 F.3d 53, 59 (1st Cir. 2009)).

The court of appeals then determined that "[petitioner's] claims fail this test because he has not demonstrated that members of his proposed group are perceived by gang members or others in El Salvador as a discrete group." App., *infra*, 4a (citing *Ucelo-Gomez* v. *Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007) (per curiam), and *S-E-G-*, 24 I. & N. Dec. at 586-588). The court also determined that "the proposed group is inchoate, as it is comprised of a potentially large and diffuse segment of El Salvadoran society." *Id.* at 4a-5a (citing *S-E-G-*, 24 I. & N. Dec. at 585). "To the extent that [petitioner] suggests that the [BIA's] definition of 'particular social group' should not control here," the court continued, "we defer to its reasonable interpretation of that term." *Id.* at 5a (citing *Scatambuli*, 558 F.3d at 59-60, and *Castillo-Arias*, 446 F.3d at 1197-1198).

REASONS FOR GRANTING THE PETITION

In the decision below, the Fourth Circuit concluded that petitioner was not entitled to asylum as a member of a "particular social group," on the ground that the proposed group failed to satisfy the requirements of "social visibility" and "particularity." In so concluding, the Fourth Circuit held that the BIA's recent adoption of those requirements was entitled to deference. That

holding deepens a circuit conflict concerning the validity of the social-visibility and particularity requirements—requirements that have no basis in the INA and that, if upheld, would dramatically narrow the class of aliens eligible for asylum. The definition of "particular social group" is a recurring issue of great importance to the administration of the immigration system, and this case constitutes an optimal vehicle in which to consider the issue. Certiorari should therefore be granted.

A. The Decision Below Deepens A Circuit Conflict Concerning The Definition Of "Particular Social Group"

1. In this case, the Fourth Circuit joined with seven other circuits in adopting the BIA's social-visibility and particularity requirements. The decisions of those circuits, however, conflict with two decisions of the Seventh Circuit, both written by Judge Posner, rejecting those requirements. This Court should intervene to resolve the resulting conflict.

a. In *Gatimi* v. *Holder*, 578 F.3d 611 (2009), the Seventh Circuit first refused to defer to the BIA's newly minted requirements. *Gatimi* involved an application for asylum by a defector from a Kenyan group that was "much given to violence." *Id.* at 613. After the defector was attacked for leaving the group, he fled to the United States, along with his relatives (who joined him in applying for asylum). *Id.* at 614.

The Seventh Circuit vacated the BIA's decision to uphold the applicants' removal and remanded for further proceedings. *Gatimi*, 578 F.3d at 618. As is relevant here, the court rejected the BIA's consideration of social visibility as "a criterion for determining [membership in a] 'particular social group.'" *Id.* at 615. The court acknowledged that "the [BIA's] definition of 'particular social group' is entitled to deference," *ibid.*, and that "our

sister circuits have generally approved 'social visibility' as a criterion" in the "particular social group" inquiry, *id.* at 616. But the court noted that "the [BIA] has been inconsistent rather than silent" in its consideration of social visibility, finding some groups to qualify without reference to that factor. *Id.* at 615-616. The court reasoned that the social-visibility requirement "makes no sense," because the BIA had not "attempted, in this or any other case, to explain the reasoning behind th[at] criterion." *Id.* at 615. And the court explained that the requirement would lead to perverse results because, "[i]f you are a member of a group that has been targeted for * * * persecution, you will take pains to avoid being socially visible." *Ibid.*

The Seventh Circuit has recently made clear that it rejects not only the social-visibility requirement, but also the accompanying particularity requirement. In *Ramos* v. *Holder*, No. 09-1932, ___ F.3d ___, 2009 WL 4800123 (Dec. 15, 2009), the Seventh Circuit considered a factually similar request for relief to the one at issue here, by a Salvadoran national who had renounced his membership in MS-13. *Id.* at *1. The court once again vacated the BIA's decision to uphold the applicant's removal and remanded for further proceedings. *Id.* at *5. The court began by reaffirming its rejection of the social-visibility requirement. *Id.* at *3. The court then proceeded to reject the particularity requirement, under which a proposed group could be "too unspecific and amorphous" to qualify as a "particular social group." *Id.* at *4. The court reasoned that, while "[t]here may be categories so ill-defined that they cannot be regarded as groups," such categories could be recognized as groups as long as they were openly targeted for persecution. *Ibid.* For example, the court explained, the "middle class" would not ordinarily qualify as a "particular social group," but, "if a

Stalin or a Pol Pot decide[d] to exterminate" its members, the Russian or Cambodian middle class would. *Ibid.*

b. By contrast, eight courts of appeals—including the Fourth Circuit in this case—have now embraced the BIA's social-visibility and particularity requirements. Six courts of appeals have held that, in order to establish the existence of a "particular social group," an applicant for asylum must satisfy both requirements in addition to the preexisting immutability requirement. See *Ucelo-Gomez*, 509 F.3d at 72-74 (holding, after discussing the social-visibility and particularity requirements, that "[t]he BIA's interpretation of the statutory phrase 'particular social group' * * * was * * * reasonable"); *Galindo-Torres* v. *Attorney General*, No. 08-3581, 2009 WL 3236057, at *2 (3d Cir. Oct. 9, 2009) (per curiam) (concluding that the BIA "reasonably rel[ied] on its prior precedent setting forth th[e] [social-visibility and particularity] requirements"); *Al-Ghorbani* v. *Holder*, 585 F.3d 980, 994 (6th Cir. 2009) (noting that "the BIA has stated that the two key characteristics of a particular social group are particularity and social visibility"); *Davila-Mejia* v. *Mukasey*, 531 F.3d 624, 629 (8th Cir. 2008) (determining that the applicants for asylum "failed to establish that [their shared characteristic] gave them sufficient social visibility to be perceived as a group by society" and that their proposed group was "too amorphous to adequately describe a social group"); *Ramos-Lopez* v. *Holder*, 563 F.3d 855, 860 (9th Cir. 2009) (holding that the BIA's decision in *S-E-G-* was "a reasonable interpretation of the INA"); *Vasquez* v. *U.S. Attorney General*, No. 09-10309, 2009 WL 2868884, at *4-*5 (11th Cir. Sept. 8, 2009) (per curiam) (determining that the proposed group "lacks particularity" and "also fails the social visibility test").

For its part, the First Circuit has gone further, reasoning that an applicant for asylum must satisfy not only the three foregoing requirements but also the additional requirement that the group not be "defined *exclusively* by the fact that its members have been targeted for persecution." *Scatambuli*, 558 F.3d at 59 (citation omitted). The Fourth Circuit in this case quoted the First Circuit's standard with approval, thus suggesting that it too would embrace that additional requirement. See App., *infra*, 4a. Because the Fourth Circuit ultimately affirmed the denial of asylum based on its application of the social-visibility and particularity requirements, however, the critical point for present purposes is that it adopted those requirements—and, in so doing, deepened the conflict with the Seventh Circuit as to those requirements' validity.

c. Among the regional circuits, only the Fifth and Tenth Circuits have not taken a definite position on the applicability of the social-visibility and particularity requirements. The Fifth Circuit recently issued an opinion that signaled its approval of those requirements. See *Orellana-Monson* v. *Holder*, 332 Fed. Appx. 202, 203 (2009) (citing *S-E-G-*, 24 I. & N. Dec. at 584, and *E-A-G-*, 24 I. & N. Dec. at 594). After the applicants for asylum sought rehearing en banc based on the Seventh Circuit's opinion in *Gatimi*, however, the Fifth Circuit withdrew the opinion and granted panel rehearing, which is currently pending. See Order on Pet. for Reh'g En Banc at 1, *Orellana-Monson*, *supra* (Dec. 17, 2009). And the Tenth Circuit hinted that it would adopt the social-visibility and particularity requirements, but stopped short of expressly doing so. See *Nkwonta* v. *Mukasey*, 295 Fed. Appx. 279, 285-286 (2008) (citing *S-E-G-*, 24 I. & N. Dec. at 582). Because the overwhelming majority of the circuits have squarely addressed the issue, however,

this case presents a substantial circuit conflict that is ripe for the Court's review.

2. This case constitutes an ideal vehicle for the Court to resolve the circuit conflict concerning the definition of "particular social group," both because there are no facts in dispute here (in light of the immigration judge's finding that petitioner was credible, see App., *infra*, 21a) and because resolution of the conflict would plainly be outcome-dispositive. In affirming the denial of petitioner's asylum application, the Fourth Circuit unambiguously, if summarily, concluded that the BIA's adoption of the social-visibility and particularity requirements was entitled to deference—and that the proposed group failed both requirements. See *id.* at 4a-5a.[4]

Should this Court agree with the Seventh Circuit that the social-visibility and particularity requirements are improper, therefore, petitioner would be entitled to a remand to the BIA, because the BIA did not cite any other considerations in upholding the immigration judge's denial of asylum. See App., *infra*, 7a-8a. That is not surprising, because, under the BIA's preexisting immutability requirement, there would be no real ques-

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[4] Before the court of appeals, the government suggested that the BIA's decision rested only on the particularity and not the social-visibility requirement (though it urged the court of appeals to endorse the social-visibility requirement if it concluded otherwise). See, *e.g.*, Gov't C.A. Br. 21 n.3. For his part, petitioner noted that the BIA had cited *S-E-G-* and *E-A-G-*, both of which relied on the social-visibility requirement in rejecting proposed groups. See, *e.g.*, Pet. C.A. Br. 13-14, 18. The court of appeals evidently read the BIA's decision to rest on both requirements, because it addressed both (and it would have been improper for the court of appeals to consider a requirement that the BIA did not). See, *e.g.*, *Gonzales* v. *Thomas*, 547 U.S. 183, 185-187 (2006) (per curiam); *INS* v. *Ventura*, 537 U.S. 12, 16-18 (2002) (per curiam).

tion as to whether petitioner's proposed group would constitute a "particular social group"; indeed, the BIA has already suggested that Salvadoran youths who refuse to join MS-13 because of their opposition to its activities would satisfy that requirement. *S-E-G-*, 24 I. & N. Dec. at 584; see, *e.g.*, *Ramos-Lopez*, 563 F.3d at 860 (so reading *S-E-G-*); cf. *Ramos*, 2009 WL 4800123, at *2 (concluding that former Salvadoran gang members who refuse to *rejoin* their gangs would satisfy the immutability requirement). In any event, because neither the BIA nor the Fourth Circuit identified any other basis for refusing to recognize petitioner's membership in a "particular social group," this case is an optimal vehicle for resolution of the circuit conflict on that phrase's scope.[5]

B. The Court Of Appeals' Decision Is Erroneous

The Fourth Circuit erred in adopting the BIA's social-visibility and particularity requirements—and, in so doing, holding that the BIA's adoption of those requirements was entitled to deference.

1. To begin with, there is no basis in the text of Section 1101(a)(42)(A) for either of those requirements. That provision defines a "refugee" to include an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of

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[5] The immigration judge did suggest that, even assuming that petitioner's proposed group constituted a "particular social group," he had failed to show that he was persecuted "on account of" his membership in that group. App., *infra*, 25a. The BIA, however, did not rely on that ground in rejecting petitioner's claim on appeal, see *id.* at 7a-8a—and, for that reason, the government correctly conceded below that the only issue properly before the court of appeals was whether "[p]etitioner's proposed social group is cognizable." Gov't C.A. Br. 13 n.2.

persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). For purposes of interpreting the phrase "membership in a particular social group," the social-visibility and particularity requirements cannot be justified by resort to the interpretive canon of *ejusdem generis*, because neither social visibility nor particularity is a shared feature of the other bases for persecution identified in Section 1101(a)(42)(A)—many of which involve characteristics that can be either invisible (*e.g.*, religion) or shared by large and amorphous groups (*e.g.*, political opinion). Cf. *Acosta*, 19 I. & N. Dec. at 233 (relying on the canon of *ejusdem generis* as the basis for the immutability requirement).

Even assuming, however, that the BIA possesses some leeway to read requirements not justified by the canon of *ejusdem generis* into the definition of "particular social group," its adoption of the social-visibility and particularity requirements is not entitled to deference because those requirements simply "make[] no sense." *Gatimi*, 578 F.3d at 615. With regard to social visibility, such a requirement verges on the absurd, because, "[i]f you are a member of a group that has been targeted for * * * persecution, you will take pains to avoid being socially visible." *Ibid.* As a result, "[t]he only way * * * that [aliens] c[ould] qualify as members of a particular social group is by pinning a target to their backs with the legend" that they are group members. *Id.* at 616. It is questionable whether *any* group would satisfy such a requirement, with the possible exception of a readily distinguishable ethnic tribe or clan (whose members may in any event be eligible for asylum on other

grounds).[6] And with regard to particularity, it is hard to see why the size or shape of the group should matter, as long as the shared characteristic at issue is specifically identified and immutable (and the alien in question has a well-founded fear of persecution "on account of" membership in a group with that characteristic). See *Ramos*, 2009 WL 4800123, at *4. Because "[t]he [BIA] has never given a reasoned explanation" for the social-visibility and particularity requirements, they should be rejected. *Id.* at *3; see *Gatimi*, 578 F.3d at 615.

2. More generally, the BIA's newly minted social-visibility and particularity requirements "represent[] a sudden, unexplained departure from U.S. precedent and the dominant view of the international community." Fatma E. Marouf, *The Emerging Importance of 'Social Visibility' in Defining a 'Particular Social Group' and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 Yale L. & Pol'y Rev. 47, 103 (2008) (Marouf).

As to domestic precedent, the BIA's decisions adopting those requirements cannot be reconciled with prior

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[6] To be sure, for purposes of establishing a well-founded fear of persecution *on account of* membership in a particular social group, it may be relevant whether "a feared persecutor could easily become aware of an applicant's protected beliefs or characteristics." *Eduard* v. *Ashcroft*, 379 F.3d 182, 192-193 (5th Cir. 2004) (internal quotation marks and citation omitted). But that is a far cry from a requirement that the shared characteristic already be known to society as a whole. See *Ramos*, 2009 WL 4800123, at *3 (noting that the government had argued that, under the social-visibility requirement, "you can be a member of a particular social group only if a complete stranger could identify you as a member if he encountered you in the street"); *Gatimi*, 578 F.3d at 616 (noting that the government had "state[d] flatly" that "secrecy disqualifies a group from being deemed a particular social group").

decisions of the BIA and the courts under the preexisting *Acosta* immutability test, which have recognized "particular social groups" without reference to those requirements—most notably, women opposed to genital mutilation, see, *e.g.*, *Kasinga*, 21 I. & N. Dec. at 365-366; *Agbor* v. *Gonzales*, 487 F.3d 499, 502 (7th Cir. 2007), and homosexuals, see, *e.g.*, *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822-823 (B.I.A. 1990); *Nabulwala* v. *Gonzales*, 481 F.3d 1115, 1117 (8th Cir. 2007). In adopting the social-visibility and particularity requirements in more recent decisions, the BIA neither abrogated those prior decisions nor made any meaningful effort to reconcile them. If those prior decisions remain valid, the BIA's adoption of its additional requirements is not entitled to deference, because "a court cannot pick one of the inconsistent lines [of agency decisionmaking] and defer to that one." *Gatimi*, 578 F.3d at 616 (citing cases). On the other hand, if those prior decisions no longer remain valid, the BIA's unelaborated change in position is not entitled to deference either. See, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

As to international law, in adopting the social-visibility and particularity requirements, the BIA relied on the 2002 guidelines of the United Nations High Commissioner for Refugees (UNHCR). See *S-E-G-*, 24 I. & N. Dec. at 586-587. In so doing, however, the BIA "misconstrued the[] meaning" of those guidelines—as the UNHCR has stated in recent amicus filings concerning the INA's definition of "particular social group."

E.g., UNHCR Br. at 5, *Orellana-Monson*, *supra* (May 7, 2009).[7]

The UNHCR guidelines establish a disjunctive, rather than conjunctive, test, under which a "particular social group" exists if the members of the group *either* "share a common characteristic other than their risk of being persecuted" *or* "are perceived as a group by society." UNHCR, *Guidelines on International Protection: 'Membership of a Particular Social Group' Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees* ¶ 11, at 3, U.N. Doc. HCR/GIP/02/02 (May 7, 2002).[8] Those guidelines thus suggest that, if the immutability requirement of *Acosta* is satisfied, the "particular social group" inquiry is at an end. It is only if that requirement is *not* satisfied that a court must engage in "further analysis * * * to determine whether the group is nonetheless perceived as a cognizable group in th[e] [relevant] society" (and seemingly without regard to whether the characteristic shared by the group is "visible" or not). *Id.* ¶ 13, at 4. And the UNHCR's guidelines contain no reference to any sort of freestanding "particularity" requirement; to the contrary, the UNHCR has taken the position that the particularity requirement "is confusing and does not provide helpful guidance." UNHCR

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[7] Notably, the government has essentially conceded that the BIA's approach is inconsistent with the UNHCR's. See Gov't Supp. Letter Br. at 10, *Orellana-Monson*, *supra* (Nov. 18, 2009).

[8] See *Secretary of State for the Home Dep't* v. *K* [2006] UKHL 46, ¶ 16 (opinion of Lord Bingham) (noting the UNHCR's view that "the criteria * * * should be treated as alternatives, providing for recognition of a particular social group where either criterion is met and not requiring that both be met").

Br. at 8, *Orellana-Monson*, *supra*. Because "one of Congress' primary purposes [in enacting the Refugee Act] was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees," *Cardoza-Fonseca*, 480 U.S. at 436-437, and because the UNHCR guidelines interpret that protocol, those guidelines are a "useful * * * aid" in interpreting provisions of the Refugee Act such as Section 1101(a)(42)(A). *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).[9]

In sum, there is no basis in law or logic for the BIA's novel social-visibility and particularity requirements, and those requirements narrow eligibility for asylum beyond what Congress could conceivably have intended. This Court should grant review and reverse the Fourth Circuit's erroneous decision adopting those requirements.

C. The Question Presented Is An Important And Recurring One That Merits The Court's Review

The question presented in this case—*i.e.*, whether a group must be "socially visible" and "particularized" to qualify as a "particular social group" for purposes of Section 1101(a)(42)(A)—is one of obvious importance to the administration of the immigration system. That question therefore warrants this Court's review.

1. As the government has noted in prior filings in this Court, "[a]sylum applications * * * play a significant role in the immigration work and workload of the Justice Department and the Department of Homeland

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[9] Consistent with the UNHCR guidelines, a number of other countries have applied the immutability requirement in determining whether a group qualifies as a "particular social group," with some relying on the BIA's decision in *Acosta* in doing so. See Marouf, *supra*, at 51-57.

Security." Pet. at 22, *Gonzales* v. *Thomas*, 547 U.S. 183 (2006) (No. 05-552). In Fiscal Year 2008, over 47,000 claims for asylum were adjudicated in removal proceedings alone (a figure that does not include claims by aliens not in removal proceedings, which are processed by the Secretary of Homeland Security). See Executive Office for Immigration Review, Dep't of Justice, *Immigration Courts—2008 Asylum Statistics* (Mar. 2009) <www.justice.gov/eoir/efoia/FY08AsyStats.pdf>. Every year, moreover, thousands of those claims culminate in petitions for review in the federal courts of appeals. See Pet. at 21, *Thomas*, *supra* (noting that, in Fiscal Year 2005, 4,460 petitions for review were filed in asylum cases).

As a result, courts are frequently confronted with questions concerning the standards of eligibility for asylum—and the decisions of those courts, in turn, "can have a significant impact on immigration policy and the administration of the immigration laws." Pet. at 23, *Thomas*, *supra*. There can be no doubt, moreover, that the specific question presented in this case is a frequently recurring one: as noted above, all but two of the regional circuits have definitively addressed the question presented *since 2007*, with most of those circuits doing so in the last eighteen months (in the wake of the BIA's decision in *S-E-G-*, which made clear that BIA treated social visibility and particularity as discrete requirements for membership in a particular social group). See pp. 10-14, *supra*.

2. The BIA's recent adoption of the social-visibility and particularity requirements has received considerable attention from commentators—and has caused widespread consternation in the immigration bar. See, *e.g.*, Danielle L.C. Beach, *Battlefield of Gendercide: Forced Marriages and Gender-Based Grounds for Asylum and Related Relief*, Immigr. Briefings, Dec. 2009, at 1, 9 (con-

tending that, "[s]ince *Acosta*, the Board has offered a complex and at times confusing and contradictory definition of what constitutes a particular social group"); Marouf, *supra*, at 51 (asserting that the BIA's new approach "destroys *Acosta*'s principled framework, represents an abdication of U.S. obligations under the 1967 Protocol, cannot be applied in a consistent way, and ignores the complex relationship between visibility and power"); Joe Palazzolo, *Fight Over New Asylum Barrier: Lawyers Ask Holder For A Review*, Legal Times, Mar. 2, 2009, at 1 (noting that the BIA's decision in *S-E-G-* "cast new clouds on an increasingly murky section of asylum law"; that "[i]mmigration experts say the ruling is likely to create confusion among the nation's 214 immigration judges"; and that critics "say the board's decision guts a 24-year-old precedent [*Acosta*]"). In addition, many of the cases in which the BIA has sought to apply the social-visibility and particularity requirements arise in factual contexts similar to, if not indistinguishable from, the context here. Indeed, *S-E-G-* itself involved a materially identical proposed group: *viz.*, Salvadoran youths who refused to join gangs because of their opposition to the gangs' violent activities. See 24 I. & N. Dec. at 581.

3. In the nearly thirty years since the enactment of the Refugee Act, this Court has never directly addressed the definition of "particular social group"—an issue with which, as then-Judge Alito noted almost two decades ago, "[lower] courts * * * have struggled." *Fatin*, 12 F.3d at 1238; cf. *Thomas*, 547 U.S. at 186-187 (summarily reversing, on procedural grounds, a Ninth Circuit decision on the definition of "particular social group"). There is an overwhelming need for a uniform definition of that phrase, because the fate of an applicant for asylum should not turn on the location in which the application is adjudicated. Just as importantly, there is no valid justi-

fication for the BIA's newly minted, and radically more restrictive, definition, which casts doubt on the validity of earlier decisions granting protection to groups such as women opposed to genital mutilation. This Court should grant review in order to resolve the circuit conflict on the validity of the BIA's current definition. And it should reject that definition and thereby restore the previously settled understanding of a vitally important provision of the immigration laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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